BRIEF IN SUPPORT OF PETITION

I

Statute Involved

Section 303 (a) (3) of the Revenue Act of 1926 (44 Stat. 72, 26 U. S. C. A. § 412), as amended, reads as follows:

> "For the purpose of the tax the value of the net estate shall be determined—
>
> "(a) In the case of a citizen or resident of the United States, by deducting from the value of the gross estate—
>
> * * * * * * * * *
>
> "(3) The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, or to a trustee or trustees, or a fraternal society, order, or association

operating under the lodge system, but only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals.
* * *"

II

The novelty and importance of the question involved requires an early authoritative decision of this Court.

This Court has never passed upon the question of whether, in computing the federal estate tax, the amount of a deduction for a charitable bequest must be reduced by a sum equivalent to the amount paid, or agreed to be paid, by the charitable beneficiary to a contestant of the will in settlement of the contest. The statute is silent. It apparently was assumed, prior to the decision of this Court in *Lyeth* v. *Hoey, supra,* that amounts so paid were taxable to the recipient under the income tax law. That case, holding such amounts not to be taxable income, has resulted in an effort by the taxing authorities to treat such amounts, regardless of the source and manner of payment, as subject to estate tax. The question has been before the Commissioner on numerous occasions.

Prior to the decision below in the instant case, one Circuit Court of Appeals had held, in the only appellate decision on the question (*Robbins* v. *Commissioner, supra*), that the principles of the *Lyeth Case* had no application to estate tax situations. Our case came next. The court below, in reality, took the view that, since the amount paid the contesting widow was not subject to income tax, it must be subject to estate tax and ignored the reasoning

of the *Robbins Case* in favor of that in the *Lyeth Case*. The *Thompson Case, supra,* just decided by the Second Circuit rests upon our case, and certiorari will be sought there.

To reach the result which it did, the court below had to fly in the face of the established rules laid down by this Court that the estate tax is one on transmission and is to be determined by what the testator did as of the date of his death (See III, *infra*). It had to conflict with the reasoning of the *Robbins Case* (See IV, *infra*) and it clearly misapplied the principles of the *Lyeth Case* (See V, *infra*). It was required to stretch the plain language of the applicable statutory section beyond all basis (See VI, *infra*) and thereby invaded the Congressional field of legislation, since the statute does not contemplate the situation here (See VII, *infra*).

We thus have a conclusion, in the instant case, which is not only unsoundly and illogically reached, but which is plainly wrong, giving rise to unjust and impractical results, as will be pointed out. The law on the subject is not only uncertain now, but abounds in possibilities of injustice and confusion in the future. The situation involved is not an uncommon one and testators and their executors are entitled to an authoritative ruling by this Court.

III

The decision of the lower court is in fundamental contravention of the rules laid down by this Court that the situation created by the will of the testator is controlling as to deductions for estate tax purposes, unless otherwise provided by statute.

It is fundamentally established by a long line of decisions

of this Court that the federal estate tax is one on transmission and not on succession. *Knowlton* v. *Moore,* 178 U. S. 41, 48, 49. The law taxes not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of death. It is a levy on the act of the testator, not on the receipt of property by the legatee, coming into existence before, and independent of, the receipt of the property by the legatee. *Y. M. C. A.* v. *Davis,* 264 U. S. 47; *Edwards* v. *Slocum,* 264 U. S. 61; *New York Trust Company* v. *Eisner,* 256 U. S. 345, 348, 349. Consequently, it is the will of the testator and the situation existing at the time of his death which governs. Generally speaking, the right to a deduction depends alone upon what the testator did. *Y. M. C. A.* v. *Davis, supra; United States* v. *Provident Trust Co.,* 291 U. S. 272.

These primary rules relating to the basic nature of this tax and the construction of the applicable statute should constitute the first line of reasoning in the controversy at bar. They must prevail, unless Congress has legislated an exception to them in the particular instance of moneys paid by charitable beneficiaries in settlement of will contests. Obviously, the law contains no such exception. The court in the *Robbins Case* grounded its conclusion on this basis—the status as created by the testator in his will must govern. If he left the residue to charity, such bequest is deductible; if he did not, it is taxable irrespective of happenings subsequent to death.

Our court, in its opinion (R. 79), recognized the rules, but invented a device to attempt to avoid their consequences. It said that since there are events occurring after death which affect the amount of the taxable estate, such as the incurring of administration expenses, there is no reason why payments made by a charity to a contestant cannot fall in the same category. The error is manifest,

for the deductibility of administration expenses is expressly allowed by Sec. 303 (a) (1) of the statute. There is absolutely no mention of the treatment of payments to a will contestant. To allow such an invention to stand without legislative basis, is to open wide the door to deviations from the fundamental theory of this tax, contrary to the expressed intent of Congress.

IV

The decision of the lower court is in conflict with the reasoning of *Robbins* v. *Commissioner* in the First Circuit Court of Appeals.

As has been indicated, the first appellate decision involving this question was *Robbins* v. *Commissioner, supra,* in the First Circuit. There Amherst College was a contingent legatee in remainder. A next-of-kin of the testator contested the will. An agreement of settlement of the contest was entered into, to which the college was a party and by which it was to receive a minimum sum certain in the future from the residuary legatee. Thereafter, the executor sought a deduction in estate tax in the amount Amherst was to receive by virtue of the compromise agreement. The Circuit Court affirmed the denial of the claimed deduction.

In its opinion, it gave the sound reason that the deduction could not be allowed, under the fundamental rules discussed in III, *supra,* because the money Amherst was to receive was not given to it under the will of the testator. The Court said:

"Hence, it is clear that whatever rights Am-

herst College has now come to it through the compromise agreement and not under the will of the testator. The compromise agreement is not the will of the testator. *Obviously, to allow a deduction of the gift of* $250,000.00 *to Amherst College, * * * is to allow a deduction not under the will of the testator but under the compromise agreement. This would not be a transfer tax on the property of the decedent at the date of his death. It is not a deduction permissible under this statute.*" (italics ours)

It further held that the principles of *Lyeth* v. *Hoey, supra,* (to be discussed under V, *infra*) had no application to these estate tax situations.

In the court below, petitioners relied upon the reasoning in the *Robbins Case,* believing it to be sound and consonant with the statutory language and the theory of the tax. We think the result of the *Robbins Case* is right and properly spelled out, even though the deduction was disallowed. Our court ignored the reasoning of that case and inferentially disapproved it. To have accepted it, would have required the allowance of petitioners' claim for deduction. It attempted to dispose of the case without mention of the rationale, by involvedly arguing that the First Circuit might have decided it on another basis, consistent with *Lyeth* v. *Hoey, supra,* which would have made the expressed reasoning unnecessary (R. 84). The attempted differentiation is subject to the same fundamental weakness pointed out in III, *supra,* and V, *infra.*

The Second Circuit, in the recent *Thompson Case, supra,* took the same tack in its cursory treatment of the *Robbins* decision, although there is an inferential intimation that there is a difference in the reasoning of the two opinions.

We have, then, a clear conflict in the reasoning of the Circuits. The First Circuit is sound in its approach; the Second and Third Circuits sacrifice principle to insure taxability. This Court should resolve the conflict and dictate the correct approach.

V

The principles of *Lyeth* v. *Hoey* have no application to estate tax situations and the misapplication of the broad language in that decision has resulted in confusion and uncertainty in the law.

The court below based its decision primarily on the principles enunciated by this Court in *Lyeth* v. *Hoey, supra.* The Second Circuit, in the *Thompson Case,* applied the same reasoning, although conceding that there may be areas of gap and overlap in the field of federal taxation. The First Circuit, in the *Robbins Case,* said that the reasoning of the *Lyeth Case* did not apply in estate tax situations.

Let us consider the *Lyeth Case.* A testator bequeathed her residuary estate to a charity. Certain of her heirs contested the will. A settlement agreement was entered into, which, in substance, divided the residue between the heirs and the charity. The probate court decreed that the executors were to administer the estate in accordance with the will and the agreement. The question arose as to whether one of the heirs was liable for income tax on the amount he received under the compromise agreement. Involved only was the interpretation of Sec. 22 (b) (3) of the Revenue Act of 1932, which exempts from income tax "The value of property acquired by gift, bequest, devise or inheritance * * *". This Court reasoned that the heir obtained what he received under the agreement "be-

cause of his standing as an heir and of his claim in that capacity". It was concluded that the amount so received was, consequently, an "inheritance" within the meaning of that word as used in the above section.

Our court adopted this reasoning *in toto*—"what the widow received in settlement of the will contest, she took by 'inheritance' within the meaning of the Revenue Acts." (R. 84). The court, at the same time, admitted that she took in spite of the will—not because of it and not under the intestate law. We thus have, in the first place, the creation of a novel category of succession denominated "inheritance", hitherto unknown to the applicable law. Secondly, and more important, this word "inheritance" is not found in Sec. 303 (a) (3), or any other applicable section of the estate tax law, as it is in the income tax law. The theories of the two taxes are vitally different. As the First Circuit said in the *Robbins Case*, in discussing *Lyeth* v. *Hoey*:

> "It would not follow from this, however, that the gift which Amherst received under the compromise agreement should itself be regarded as the gift of the testator and a 'bequest' within the meaning of Section 303 (a) (3). The purposes of the two sections of the Revenue Act are not identical. As we have pointed out, the estate tax is based upon the value of the interest which ceased at the time of the testator's death."

While we do not quarrel with the result of the *Lyeth Case*, we do say that, no matter how broad the language of the opinion, its reasoning, in the interpretation of a word in one statute, cannot be applied automatically to another piece of legislation where the same word does

not appear and where the theory and problem involved are quite different, despite superficial similarities of fact.

The test of the applicability of the language of the *Lyeth Case* lies in its extremities. In New Jersey, the widow has no statutory right of election against a will, except as to dower in real property (not involved in the case at bar). She may be validly cut off without a penny. See *Schaefer* v. *Gessler,* 121 N. J. Eq. 42, 44, 188 Atl. 439. Her standing to contest, like that of any other next-of-kin, may well be without substantial foundation and constitute nothing more than a nuisance. Frequently, a charitable beneficiary will settle such claims only to avoid the expense of protracted litigation, to speed administration and to safeguard against the long chance that, if the contestant should win and the entire will is thus voided, it will take nothing. Suppose the contestant was a purported common-law wife, or an alleged illegitimate child, or an impostor, with no real facts to support the alleged relationship, or a stranger in blood who was mentioned in a prior will. A settlement of such caveats is frequent in order to be rid of the contestant with the least possible notoriety and expense. There may be a right to file a caveat, but certainly no basis of "inheritance", in the event of settlement. These situations all demonstrate that the rights of a contestant arising from a settlement agreement arise not under the will or by intestacy, but by contract, and that there is no such thing as succession by "inheritance" in such cases.

Moreover, such results being contractual between the contestant and the charitable beneficiary, the executors, as in the case at bar, are not usually parties to the agreement. An executor may not even know of such agreements. It is imposing a very heavy burden of responsibility to visit upon him the tax consequences of such "deals",

which may well be consummated privately and long after his duties of administration have terminated and the estate distributed. In addition, in this case, the probate court decreed that the entire residue should be paid to the charity (R. 77). The latter gave a refunding bond and release to petitioners in that amount, as required by New Jersey law. Revised Statutes of New Jersey 1937, Sec. 3:26-19 and 20. The widow, under the agreement, was a complete stranger to them; she could not be compelled to refund a cent if additional debts were subsequently established.

Furthermore, this theory of taking by "inheritance" would require the gross estate, for estate tax purposes, to be established as of the date of death, but the net estate to be determined by events transpiring long thereafter. Congress never intended any such result by the language it used in Sec. 303 (a) (3).

It is obvious that the principles and language of *Lyeth* v. *Hoey* cannot stand the test of application to estate tax cases. The attempt so to do in the instant case is a misapplication, resulting in confusion and uncertainty in the law.

VI

The court below erred in construing Sec. 303 (a) (3) to mean that a charitable bequest is deductible only to the extent actually used for charitable purposes.

As a secondary reason for its conclusion, the court below said that this statutory section must be read to mean that a charitable bequest is deductible only to the extent that the charity receives and uses it for charitable purposes. In support of this view, the court pointed to language in the statute which exempts bequests to trustees or

lodges, as distinct from charitable corporations, if such gifts "are to be used" by such trustees or lodges exclusively for charitable purposes.

This point of construction has never been passed upon by this Court. The section does not purport to impose the alleged limitation of deductibility where the legatee is a charitable corporation. The effect of the lower court's view is to impose a stricter rule in the case of trustees or lodges—certainly an odd result.

The reason why the section contains this so-called limitation in the case of trustees and lodges is apparent. Not being essentially charities, Congress had to be sure that, from the language of the will, the testator intended his bequest to such a trustee or lodge, *ab initio,* "to be used" for charitable uses only, as in the instant case. We submit that the statutory language relates to the terms of the will and not to events subsequent to death. The two types of charitable bequest mentioned in the statute are thereby put upon an equal basis. To carry the thought of the court below to its logical conclusion would mean that a bequest to a charitable corporation, to be deductible, need not be used for charitable purposes. Such a differentiation is absurd and could never have been intended by Congress.

Assuming an equal footing in the law for both types of charitable bequest, we come to the general construction placed thereon by our court that deductibility must be measured by the actual number of dollars ultimately used for charitable purposes. To be logical, this rule must be applied not only in situations where the charitable beneficiary pays moneys in settlement of a will contest, but also in every other case, to the extent that every dollar received will have to be traced to be certain that it is spent only for charitable purposes. For example, the deduction would have to be reduced by the amount a charity paid its at-

torneys to represent it in the estate proceedings. Moreover, this rule would produce inequitable and impractical results. What would happen, tax wise, if a charitable devisee of land were to make a compromise settlement by the payment of money, no part of which had been received under the will, at the same time retaining the land? Suppose a charitable beneficiary settled a contest by agreeing to pay a specific sum which turned out to be in excess of the amount it ultimately received under its legacy. How would the estate tax be computed in such a situation if this rule is to be the law? To pose the question is to demonstrate the danger.

Again we say, the statute is barren of any language which can reasonably give rise to such a conclusion. Congress has simply not so said. The court below has just gone too far. Its attempted reliance on Art. 47 of Treasury Regulation 80 is of no help for that article obviously relates to charitable bequests made conditional by the terms of the will itself.

The practical reason why the statutory section goes no further than it does is a sound one. While the deriving of revenue is important, there must be some date at which further inquiry is cut off in order that estates may be seasonably administered and closed. Were the lower court's rule to be adopted, a charitable bequest would have to be followed by executors indefinitely to insure against a nondeductible diversion. Congress, therefore, has seen fit, by not saying more than it did, to limit the taxable basis in these situations to the will of the testator as of the date of his death, in line with the general theory of the estate tax.

VII

The court below invaded the Congressional field of legislation.

Petitioners submit that the controversy in the case at bar boils down to a situation in which the Second and Third Circuits have construed the language of Sec. 303 (a) (3) beyond any reasonable basis and have attempted, by judicial fiat, to plug a gap left by Congress in the statute. No matter how desirable it may be to subject moneys received from charitable beneficiaries in settlement of a will contest to some form of tax, it is beyond the province of the courts to legislate on the subject by reading something into the estate tax law which is not there. The remedy is with Congress.

The Second Circuit in the *Thompson Case* sensed the difficulty, although still taking the expedient course. That court adverted to the situation in this language:

> "While there are no doubt areas both of gap and of overlap in the field of federal taxation, we cannot lightly assume that the contestants take 'by inheritance', so as to be free from income tax, the very same amounts which the charities receive as 'legacies' so as to permit an estate tax deduction."

Under all of the circumstances, the elementary principle must be applied that a tax statute is to be construed liberally in favor of the taxpayer. *Bowers* v. *New York & Albany Co.*, 273 U. S. 346, 350. This rudiment is specifically applicable to provisions concerning the exemption from tax of bequests to charity. *Beggs* v. *United States*, 27 Fed. Supp. 599, 606.

For the foregoing reasons, a writ of certiorari should be granted.

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